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No. 93-1797

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Petitioners,

vs.

MORTON INTERNATIONAL, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF OF RESPONDENTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Due Process Clause of the Fourteenth Amendment violated when a state supreme court *sua sponte* invokes a doctrine of regulatory equitable estoppel to impose retroactive liabilities without providing notice of consideration of such a claim or allowing an evidentiary hearing on any disputed genuine and material issue of fact?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The parties to the proceedings in the Supreme Court of New Jersey were Morton International, Inc. (as plaintiff-appellant); General Accident Insurance Company of America, Affiliated FM Insurance Company, Continental Casualty Company, and First State Insurance Company (as defendants-respondents); and Liberty Mutual Insurance Company, American Home Assurance Company, Insurance Company of North America, Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies (as defendants-respondents and cross-appellants).

Respondents supporting the petitioners pursuant to Rule 12.4 are Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies and Affiliated FM Insurance Company. The Rule 29.1 list of parent companies and subsidiaries (other than wholly-owned subsidiaries) is produced at Appendix 13a.

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CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment, U.S. Constitution, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Respondents adopt Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

The Supreme Court of the State of New Jersey in its opinion below determined that insurance companies were estopped from asserting the clear meaning of a policy exclusion. The estoppel claim was not raised by the policyholder, Morton, or by the many amici who supported Morton at any stage of the litigation before the New Jersey Supreme Court issued its opinion. The "evidence" relied upon by the Court was first accepted into the record of the case on the day the Court issued its opinion. The "evidence" was first submitted by amici, over the objections of petitioners and these respondents, while the matter was pending before the Supreme Court. The insurers challenged both the propriety of the Court's reliance on the submission and the accuracy and completeness of the submission, and requested a plenary hearing of these issues.

The New Jersey Supreme Court ruled against the insurance companies on a claim that had never been made before the decision, without affording any proper opportunity to challenge the purported facts on which the Court relied. This ruling is a clear violation of the fundamental due process requirements of notice of a claim and opportunity for proper hearing of the defense to the claim.

REASONS FOR GRANTING THE WRIT

The Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies (hereafter London Market Insurers) who are parties to this litigation are subscribers to policies of insurance naming Velsicol Chemical as the named

insured and Woodridge as an additional insured. London Market Insurers were sued by Morton in its capacity as successor in interest to Woodridge. All London policies at issue before the New Jersey Supreme Court expired before 1970, the relevant date for the regulatory submissions.

Although several of the policies at issue subscribed to by London Market Insurers contain pollution exclusions, the exclusions were not of the form discussed by the New Jersey Supreme Court in its opinion regarding estoppel.

London Market Insurers were not members of the IRB, and were not admitted insurers in the State of New Jersey. London Market Insurers did not participate in the IRB filings with the New Jersey Department of Insurance. London Market Insurers made no later filings regarding the IRB form pollution exclusion with the New Jersey Department of Insurance.

A committee of the Lloyd's Non-Marine Association drafted a form pollution exclusion with conditional exceptions in 1961, form NMA 1333. In 1969, the committee drafted pollution exclusion forms NMA 1683 and 1685. These forms were often used by Lloyd's Underwriters and by London Market Companies. After the IRB form pollution exclusion was produced, however, some policyholders requested that the IRB form pollution exclusion be part of the London policies instead of the NMA form. On some occasions, London Market Insurers acceded to the request.

In certain of those instances, policyholders are now asserting that London Market Insurers are also bound by the New Jersey Supreme Court opinion on estoppel in *Morton*. We refer the court, as an example, to the brief of Chemical Leaman Tank Lines to the United States Court of Appeals for the Third Circuit (Appendix at 1a).

At an elementary level, it should appear that in order for a claim of regulatory estoppel to be made against a party, that party must have had some communication with the regulators on the matter for which estoppel is sought. This point, however, appears to have eluded some litigants in New Jersey, and there is at least the risk it may elude some judges.

London Market Insurers accordingly have an interest in having this Court address the issues raised by the petitioners.

Affiliated FM Insurance Company also supports the pending Petition. Similar to the position of London Market Insurers, Affiliated FM Insurance Company was not a member of the IRB and did not participate in the IRB filings with the New Jersey Department of Insurance, although it did utilize the form of pollution exclusion discussed by the New Jersey Supreme Court in the opinion at issue.

Accordingly, Affiliated FM Insurance Company, like the London Market Insurers, had no communication, directly or through any representative, with the regulators on the matter for which estoppel is sought. For this reason, Affiliated FM Insurance Company did not join in the Petition but, nonetheless, supports same and joins in the comments of the London Market Insurers.

London Market Insurers do not wish to burden this court with unnecessary repetition of points and authorities raised in the petition. We would only emphasize that the opinion of the New Jersey Supreme Court strikes at core concepts of justice in the Western World, concepts embodied in the U.S. in, among other mandates, the due process clause of the Fourteenth Amendment.

The New Jersey Supreme Court's opinion can clearly be seen as a breach of due process when one considers:

1. The theory on which coverage was found, regulatory estoppel, was never argued by either the policyholder or the multitude of *amici*.

2. There was no discovery permitted and no cross-examination opportunity afforded regarding the purported Department of Insurance file as respects whether it was genuine and complete.[1] The purported file was first proffered by *amici* before the

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[1] London Market Insurers objected to the submission of what later proved to be only parts of the Department file when it was proffered to the New Jersey Supreme Court to demonstrate ambiguity. *See* Petitioners' Appendix at 207a-209a. Subsequently, there were several submissions of other parts of the purported file by *amici* for Morton.

New Jersey Supreme Court. The Court's reliance on the purported file constitutes a *de novo* finding of fact without a hearing. Further exacerbation derives from the formal acceptance of the file into the record by the Court on the same day it issued its opinion.

3. The Court accepted as "evidence" publications consisting of unfettered advocacy by attorneys pressing the policyholders' point of view. *See especially* Petitioners' Appendix at 51a-52a, Opinion of the New Jersey Supreme Court, quoting and relying upon Robert Sayler of Covington & Burling, also counsel for *amici* for Morton.

Fundamental fairness, embodied in and by the Fourteenth Amendment, requires notice of the claim against a party, and an opportunity for a hearing to present a defense of that claim. Here, these requirements were in essence abrogated by the New Jersey Supreme Court, in the name of judicial notice and judicial economy. *See, e.g.*, Petitioners' Appendix at 35a, Opinion of the New Jersey Supreme Court.

London Market Insurers do not suggest that this Court enter the thicket of state law contract interpretation issues, e.g. on the meaning of "sudden." Nor do we suggest that this Court determine whether a claim for regulatory estoppel can exist nor what the elements of such a claim must be. We do suggest that the Court mandate that the State Courts dealing with such issues must comply with federal constitutional guarantees of adequate notice of a claim, and a proper opportunity to defend the claim.

CONCLUSION

London Market Insurers respectfully suggest that judicial economy cannot override due process, and that this Court should remand this matter to the New Jersey Supreme Court with instructions to strike those portions of the opinion regarding estoppel.

Dated: May 27, 1994

Respectfully submitted,

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